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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

V.

FORKLIFT SYSTEMS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION, AS AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

The Southern States Police Benevolent Association (hereafter SSPBA) is a voluntary association of law enforcement officers and related public employees with over 30,000 members in ten southern states. The North Carolina Police Benevolent Association (NCPBA) is a state chapter of SSPBA. The SSPBA and NCPBA seek to promote and protect the rights of its members through legislative advocacy and litigation.

Members of Amici are frequently confronted with serious problems of sexual harassment like that of Petitioner Teresa Harris. Amici are therefore vitally interested in the outcome of this critical case. Amici have obtained the consent of both the Petitioner and the Respondent to file this brief, and have filed letters indicating consent with the clerk's office of this Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented by the Petitioner.

ISSUE

Whether a Plaintiff in a sexual harassment case must prove that she or he suffered severe psychological injury in order to prevail on a claim brought pursuant to Title VII of the Civil Rights Act of 1964?

SUMMARY OF ARGUMENT

The Sixth Circuit opinion below has adopted an erroneous and unworkable standard of proof that is not authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, its legislative history or prior decisions of this Court. The Sixth Circuit has erroneously incorporated and imposed a damage element of "severe psychological injury" into the Title VII liability analysis. The "pervasive and severe" requirement under this Court's hostile environment doctrine refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological

well-being. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). A workplace can be abusive and poisoned, and therefore violate Title VII, without resulting in severe psychological injury to each victim.

I. THIS COURT SHOULD REAFFIRM ITS HOLDING AND RATIONALE IN MERITOR SAVINGS BANK V. VINSON

This Court should reaffirm its rich heritage of protecting individual rights against invidious discrimination including sexual harassment in the workplace. In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), this Court's unanimous decision recognized the hostile environment liability theory[1] at issue in the case sub judice. In Vinson, this Court rejected the employer's assertion that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, only proscribed "economic" or "tangible" discrimination. 477 U.S. at 64. Rather, the Court explained that Title VII contains a Congressional intent to "strike at the entire spectrum of disparate treatment of men and women in employment." Id., citing Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Vinson reasoned that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."

Vinson framed the "hostile or abusive work environment" test as follows:

> For sex harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment. 477 U.S. at 67.[2]

[1] Vinson catalogs various hostile environment cases where liability has been found for such harassment premised upon race, religion and national origin. Vinson characterized the liability theory by explaining that Title VII proscribes "a hostile or abusive work environment. 477 U.S. at 66.

[2] The EEOC Guidelines define hostile environment sex harassment as "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. section 1604.11(a)(3). In Meritor, this Court recognized that courts may properly look to these EEOC Guidelines for guidance when determining hostile environment claims. 477 U.S. at 65.

There is no suggestion in Vinson that severe psychological injury or even any psychological injury must be present in order for a hostile environment claim to be actionable. Rather, the Vinson liability standard provides that the harassment must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 477 U.S. at 67.

II. A SEX HARASSMENT VICTIM NEED NOT PROVE THAT SHE OR HE SUFFERED SEVERE PSYCHOLOGICAL INJURY IN ORDER TO PROVE SEX HARASSMENT

Sexual harassment has become an epidemic in the 1990s that presents a plethora of economic, social and personal problems for employees, families, businesses and in the public sector.[3] Since Vinson, a number of lower court decisions have grappled with the plaguing problem of sexual harassment in our workplaces.

In Sparks v. Pilot Carrier, 830 F.2d 1554, 1561 (11th Cir. 1987), the Eleventh Circuit held that sex harassment was sufficiently persistent and severe to be actionable under the Vinson standard where the plaintiff was "frightened" and "upset." Scott v. Sears, 798 F.2d 210, 213 (7th Cir. 1986) framed the test as whether the conduct "caused such anxiety and debilition to the Plaintiff that working conditions were poisoned..." Id. citing Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981). In Bundy, the court explained:

> What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted itself to sex discrimination with respect to the 'terms, conditions, or privileges of employment'...[W]e believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discrimina-

[3] See, e.g., Shulman & Abernathy, The Law of Equal Employment Opportunity, section 5.06 (1990); McGuinness, Sexual Harassment Claims: Preliminary Investigation and Client Counseling, 10 Workplace Injury Reporter 157 (Dec. 1992); McGuinness & Wintjen, Counseling Victims of Sexual Harassment, Trial Lawyer Magazine, March, 1992 at 22.

> tory work environment, regardless of whether the complaining employee lost any tangible job benefits as a result of the discrimination. Bundy's claim on this score is essentially that 'conditions of employment' include the psychological and emotional work environment -that the sexual stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused anxiety and debilitation, ... illegally poisoned the environment. 641 F.2d at 943-44.

This emphasis placed on the psychological well being of the workplace and employees has been misread by the courts below to suggest that a Plaintiff must suffer severe psychological injury in order for a hostile environment claim to be actionable. The pervasive and severe requirement refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological well-being.

The courts below have adopted this "severe psychological injury" element from Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986). Rabidue imposes the further requirement that "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance **and** creating an intimidating, hostile or offensive working environment that affected seriously the psychological well being of the plaintiff..." 805 F.2d at 619. This has the effect of placing an additional burden of proving psychological injury, even when under an objective standard the environment was hostile.

The Rabidue decision, which included a strong dissent, has been questioned in at least two subsequent Sixth Circuit decisions.[4] As demonstrated in Petitioner's brief and infra., this new "severe psychological injury" element is not provided or warranted by Title VII or its legislative history. This standard is unworkable and places an onerous burden upon aggrieved victims of sex harassment who have been genuinely hurt by a hostile environment, but have not been clinically diagnosed with severe psychological injury. A work environment can be "poisoned" and "abusive" and therefore violate Title VII without resulting in severe psychological injury.

The Third, Eighth and Ninth Circuits have not required sex harassment victims to additionally prove severe psychological injury.[5] The conclusion of the Magistrate judge below, which was adopted by the trial court and the Sixth Circuit, observed that the Respondent's conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well being." As the Ninth Circuit explained in Ellison v. Brady, 924 F.2d 872, 878n.8 (9th Cir. 1991):

> . . . perhaps the confusion in Scott and Rabidue flows from a quotation in Meritor from Rogers [6.] In its analysis, the Rogers court explained that [o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. Meritor, 477 U.S. at 66, 106 S.Ct. at 2405, quoting Rogers, 454 F.2d at 238. The Rogers court did not hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed.

As the court in Ellison further reasoned, "[n]either Scott's search for 'anxiety and debilitation' sufficient to 'poison' a working environment nor Rabidue's requirement that a plaintiff's psychological well-being be 'seriously affected' follows directly from language in Meritor." 924 F.2d at 877-78. Consequently, Ellison instructs that the new "severe psychological injury" requirement in this case which was grounded in Rabidue is not premised upon this Court's decision and analysis in Meritor. In fact, this newly adopted "severe psychological injury" requirement is inconsistent with Meritor because it requires a substantially higher threshold of proof than this Court enunciated.

The pervasive and severe requirement refers to the harasser's conduct, rather than the effect of that conduct on the victim's psychological well-being. Ellison, 924 F.2d at 878. To require victims of sex harassment to tolerate abusive and harmful harassment until "severe psy-

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[4] See Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Davis v. Monsanto Chemical Corp., 858 F.2d 345, 358 (6th Cir. 1988). Cf. Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991).

[5] See Andrews v. City of Philidelphia, 895 F.2d 1469 (3rd Cir. 1990); Burns v. McGregor, 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

[6] Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

chological injury" has materialized or been diagnosed will serve to further damage victims by perpetuating and exacerbating the injuries. This is not required. See EEOC Policy Guidance On Sexual Harassment, 8 Fair Employment Practices Manual (BNA) 405: 6681, 6690, n. 20 (March 19, 1990). (Severe psychological harm need not be shown).

Tort and personal injury principles do not require victims to sit idly by until they are psychologically wrecked before seeking judicial relief. The adoption of the Rabidue standard would require sex harassment victims to endure sexual harassment to the point of severe psychological injury in exchange for the privilege of working. This would undermine and render useless the Title VII objective of removing sexual harassment from the workplace. The decisions below directly frustrate this nation's deep commitment to eradicating sexual harassment from the workplace.[7]

The facts in the case sub judice present a flagrant and protracted pattern of malicious sexually oriented taunting, teasing and outright sexual propositioning sufficient to frighten a reasonable person and render the workplace abusive and intimidating.[8] In fact, the Magistrate below found the conduct to be offensive to a reasonable person.[9]

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[7] While Amici contend that Ellison's analysis rejecting the "severe psychological injury" requirement is sound, Amici submit that the "reasonable woman standard" adopted in Ellison is inappropriate. Amici would propose a gender neutral standard, therefore assessing the conduct in question by inquiring as to whether reasonable prudent person would offended by the alleged hostile environment. Although this issue does not appear to be squarely before the Court, the better approach appears to be to examine the issue of unwelcomeness from that of both the harasser and the victim. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988). A totality of the circumstances approach would also better determine whether sex harassment is sufficiently severe, pervasive and unwelcome.

[8] Types of actionable hostile environment sexual harassment are cataloged in Omillian & Kamp, Sex Based Employment Discrimination section 22.08 at 18 (1990). The facts of this case, recited in Petitioner's brief and found by the Magistrate, are substantially more egregious than in numerous cases that have found Title VII liability. The conduct here was intense and repetitive, and was far more than an isolated incident.

[9] There is ample evidence in the record to demonstrate the extremely offensive nature of the employer's conduct and the brutal impact upon the Petitioner. Amici further contend that the lower courts erred in the constructive discharge analysis. Amici adopt the Petitioner's arguments addressing constructive discharge. Petitioner's workplace had become dangerously offensive. Any reasonable employee would have fled the workplace for her own safety.

CONCLUSION

"In the workplace, we wage our most important battles, with poor weapons and few rights, and then, like the slaves of old, many are irretrievably trapped and there many grind away their lives in drudgery and despair." Spence, With Justice For None 162 (1989).

WHEREFORE, Amici respectfully urges this Court to reverse the judgment and decision below and to remand this case for a new trial.

Respectfully submitted.

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